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Supreme Court, U.S.
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No. 00-468

In the

Supreme Court of the United States

MARILYN B. DIONNE,

Petitioner,

vs.

DONNA E. SHALALA,
SECRETARY OF HEALTH AND HUMAN SERVICES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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ARGUMENT

1. Marilyn B. Dionne petitioned this Court for a Writ of Certiorari on the ground that the decision of the Eighth Circuit Panel Majority in the instant case conflicts directly with this Court's decision in Reeves v. Sanderson Products, Inc., 120 S.Ct. 2097 (U.S. June 12, 2000).[1] Despite the fact that Petitioner framed the questions presented, the reasons for granting the writ, her argument and request for a reversal or rehearing of the Panel Majority's decision in light of Reeves, Respondent utterly ignores Reeves in her purported Brief in Opposition. The Secretary's failure to address Reeves cannot negate its precedential value in the context of Petitioner's case.

In Reeves, this Court ruled unanimously that an employee who presents a *prima facie* case of discrimination and who also presents sufficient evidence for a reasonable factfinder to reject the employer's nondiscriminatory explanation for the decision at issue is entitled to proceed to trial. Therein, this Court also specifically noted that "[i]n appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." Reeves, supra, at 2108. The case at bar presents circumstances ripe for a factfinder's determination as to whether the employer (here the Secretary) is dissembling to cover up a discriminatory purpose. It is undisputed that Petitioner established her *prima facie* case of discrimination and, further, presented additional evidence of discrimination. (Pet. 2 n.1, 7, 12). Yet, Respondent attempts to prevent the matter from properly proceeding to trial by emphasizing that the wrong standards were applied to Petitioner's application "in the context of a complex administrative system--a system so complex that even the parties to the lawsuit failed to

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[1] As Petitioner has previously indicated, Reeves was issued after the determination of the Panel Majority in Dionne v. Shalala, 209 F.3d 705 (8th Cir. 2000), while her Motion for Reconsideration was still pending. At the time, the Eighth Circuit granted Petitioner's request to submit a memorandum to supplement her Motion, giving the Eighth Circuit notice of the Reeves decision and its applicability to the case at bar. However, the Eighth Circuit ultimately denied Petitioner's Motion, while noting that Judge McMillan and Judge Arnold would have granted a rehearing. (Pet. 11).

bring the December 1986 transmittal to the attention of the District Court." (Resp. Br. 4, 7). However, Respondent's attempt to find a safe harbor in the complexity of its own employment standards for Indians is tantamount to claiming a "presumption of regularity" for itself, a contention flatly rejected as illegal in the context of the Indian Preference Act by the Ninth Circuit, in Preston v. Heckler, 734 F.2d 1359 (9th Cir. 1984).[2]

In other words, where burden-shifting is involved, Respondent essentially argues that a complex administrative system enables the agency to deprive a plaintiff of the right to trial by simply raising the flag of mistake (or the presumption of regularity), unless the plaintiff can absolutely establish that the agency terminated her employment on the basis of intentional discrimination. However, such rationale negates the legislative intent behind Title VII,[3] the

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[2] As previously noted by Petitioner, it was pursuant to the interpretation of the Indian Preference Act by the Ninth Circuit in Preston that the Secretary modified the U.S. Office of Personnel Management ("OPM") qualification standards ("X-118 standards"). In Preston, the Secretary chose to use the generally applicable civil service standards, as did the decision-maker Delbert Haskell in the instant case, to evaluate the qualifications of Indian candidates. The Secretary argued that the conduct of the IHS should be entitled to a "presumption of regularity," and that without specific proof of any separate inquiry into the Indian candidate's unique experience and background, such an inquiry could be inferred. Preston, 734 F.2d at 1372. The Preston court found the Secretary's argument to be "wholly without merit." Id. The court further stated, "There are no facts supporting, and there is no substance to, any of the Secretary's substantive arguments. To say they are frivolous would be an act of generosity." Id. at 1373. Thus, the Preston court found the Secretary's conduct to be unlawful and affirmed the district court's holding that "under section 10(e) of the Administrative Procedure Act, it was a continuing abuse of discretion for the Secretary to apply generally applicable civil service standards to Indians applying for positions in the Indian Health Service." Id.

Moreover, this stern chiding given the Secretary was based on the Ninth Circuit's recognition that the Secretary has for over 60 years persisted to refuse to correct the obvious illegality of utilizing civil service regulations without establishing independent standards that consider the unique experience and background of Indian candidates.

[3] "The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens. . . . 'What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other

burden-shifting framework established in McDonnell Douglas v. Green, 411 U.S. 792 (1973) and Reeves, because all were premised on placing the burden on the employer to supply a justifiable explanation since an individual party is not positioned to demonstrate the thinking of an agency and its personnel. If the agency or employer can revise the process by simply claiming mistake and thereby require the employee to explain why the employer's stated reason is not a mistake, but intentional discrimination, a new rule has effectively been added to the burden-shifting framework in violation of the Administrative Procedure Act and McDonnell Douglas, to say nothing of Reeves.

2. Respondent attempts to impute the requirement under the McDonnell Douglas framework, as affirmed in Reeves, that the employer must articulate a "legitimate" nondiscriminatory reason for the decision at issue,[4] to a contention made by Petitioner. (Resp. 5-6). Respondent then contends that an employer does not have to show that the basis for its decision was proper, only that it was based on a nondiscriminatory reason. (Resp. 6). In support of this contention, Respondent relies on dicta in Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) (holding "simply that an employer does not violate the ADEA just by interfering with an older employee's pension benefits that would have vested by virtue of the employer's years of service"), which the Eighth Circuit, in turn, cited in dicta (Resp. 6; see also Pet. App. A-10), which includes the following language:

> I]t cannot be true that an employer who fires an older black worker because the worker is black thereby violates the ADEA. The employer's race is an improper reason, but it is improper under Title VII, not the ADEA.

(Pet. App. A-10). However, Hazen does not mean that if discrimination is found to be illegal under one statute, a party cannot also establish, pursuant to another statute, that he or she has been discriminated against. As Judge Lay recognized, in his

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impermissible classification.'" McDonnell Douglas, 411 U.S. at 800-01, citing Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[4] Reeves, 120 S.Ct. at 2106.

dissent, the claims of Title VII discrimination and violation of Indian Preference in the instant case are inextricably tied together:

> This discussion of the inherent failure of unlawful reasons should not be taken out of context. . . . , the Court has noted that articulation of an illegal but true reason, unrelated to the claim at issue, may satisfy an employer's burden. However, the discussion in Hazen stands in contrast to the instant facts. Here the articulated reason was lack of qualification under the X-118 standards. The very application of such standards directly violates laws designed to give preferential treatment to Native Americans in employment. Such illegality is intricately related to the Title VII claim at stake.

(Pet. App. A-14) (emphasis added). Indeed, here the very discrimination actually complained of spoke directly to discrimination on the basis of race and/or national origin in direct violation of Indian Preference. Moreover, the Eighth Circuit Panel Majority took it for granted (as have other courts) that "a failure to apply Indian preference standards could be motivated by discriminatory animus." (Pet. App. A-11).[5]

3. Respondent contends that Petitioner offered "absolutely no evidence" that the Secretary's failure to follow the proper procedures was anything but an honest mistake or that the decisions regarding the other three tribal members reflected anything other than the application of neutral employment standards. Petitioner has previously indicated to this Court that she submitted significant additional evidence in addition to her *prima facie* case (Pet. 4-6, 4-5 n. 3, 9 n. 9, 10 n. 10, 15, 19), but the Eighth Circuit, much like the district court, *sua sponte* weighed Petitioner's additional evidence regarding pretext and found it wanting, in direct contravention of Reeves. Yet, Respondent attempts to insulate these usurpations of a fact-finder's proper role at trial from further review by repeating like a mantra that the Eighth Circuit made "fact-bound"

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[5] See also Johnson v. Shalala, 35 F.3d 402, 405 n. 4 (9th Cir. 1994) ("The district court also indicated that a violation of the Indian Preference Act might constitute a violation of Title VII, where a person was deprived of an employment opportunity because of that person's race, color, religion, sex, or national origin").

conclusions. (See Resp. 5, 7). Respondent misses the point. Facts regarding evidence of pretext are properly the province of the fact-finder at trial, not the Court of Appeals, and certainly not the District Court on Summary Judgment. That is the central lesson of Reeves. Moreover, Hazen also supports the application of Reeves with regard to indirect evidence that is properly heard at trial. Therein, this Court observed that the Court of Appeals had noted that the respondent produced indirect evidence, in the form of a confidentiality agreement he was asked to sign that was more onerous than that given his younger replacement. Significantly, this Court remanded the case to the Court of Appeals to reconsider whether the jury had sufficient evidence to find an ADEA violation, even though the issue was then before this Court in a Title VII context, recognizing that "[i]n the ordinary ADEA case, indirect evidence of this kind may well suffice to support liability if the plaintiff also shows that the employer's explanation for its decision. . . is "unworthy of credence." Hazen, 507 U.S. at 613. Thus, Hazen stands for the principle recognized in McDonnell Douglas, and affirmed in Reeves, that even if a defendant meets its burden of production in a discrimination case, "[o]n remand, respondent must, . . . , be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext." McDonnell Douglas, 411 U.S. at 792, 93 S.Ct. at 1817; (see also Pet. 18, 19).

Respondent cannot escape the reach of Reeves by refusing to recognize the case and citing only McDonnell Douglas and Hazen. Petitioner is entitled to her day in court.

CONCLUSION

Petitioner requests review in light of Reeves, a decision of this Court issued after the determination of the Eighth Circuit Panel Majority in the instant case and timely brought to the attention of the Eighth Circuit while Petitioner's Motion for Reconsideration was still pending. The Eighth Circuit declined to grant rehearing. Respondent fails to address Reeves.

For the foregoing reasons and those presented in the Petition of Marilyn B. Dionne, a Writ of Certiorari should be granted.

Dated this 8th day of January, 2001.

Respectfully submitted,

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